Supreme Court of the United States

OCTOBER TERM 1965.

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

WILLIE PEACOCK, ET AL.,
Respondents,

AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

DOROTHY WEATHERS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, The City of Greenwood, Mississippi, hereinafter referred to as City, petitions that a writ of certiorari be issued to review the final judgments rendered by the United States Court of Appeals for the Fifth Circuit in causes numbered 21655 and 22597 on the docket of said Court, and styled, respectively, *Willie Peacock,*

et al. vs. The City of Greenwood, Mississippi, hereinafter referred to as the *Peacock case*, and *Dorothy Weathers, et al. vs. The City of Greenwood, Mississippi*, hereinafter referred as the *Weathers case*.

CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW.

1. The opinions of the United States District Judge for the Greenville Division of the Northern District of Mississippi in these cases are not officially reported. A copy of the District Court opinion in the *Peacock case* appears herein as Appendix A and also at page 10 of the record prepared by the United States Court of Appeals for the Fifth Circuit, a certified copy of which is filed herewith. The *Weathers case* consisted of eighteen separate causes which were consolidated by the said District Court after judgment had been rendered, but joint opinions were written in some of these eighteen causes. In all, four opinions were rendered by said District Court in the *Weathers case*, all of which appear herein as Appendixes B, C, D, and E. There also appears as Appendix F that opinion of said District Judge cited in each of the four opinions rendered in the *Weathers case*, as controlling those cases, namely, *City of Clarksdale, Mississippi vs. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964). The copies of the opinions in Appendixes B, C, D, E, and F hereto also are to be found on pages 34, 764, 789 and 862, respectively, of the record in the *Weathers case*, prepared by the United States Court of Appeals for the Fifth Circuit, a certified copy of which is filed herewith.

2. The opinions of the United States Court of Appeals for the Fifth Circuit in the *Peacock* and *Weathers cases* are not officially reported as yet; however, they appear herein as Appendixes G and H, respectively, and are to be found at pages 29 and 873 of the respective certified records.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock case* was dated and entered June 22, 1965, and in the *Weathers case* was dated and entered July 20, 1965.

On petition of City an order signed by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered extending the time within which to file a petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock case* to and including August 21, 1965.

The jurisdiction of this Court to review each of said judgments is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review in both these cases are as follows: Whether the Court of Appeals erred in reversing the District Court's holding that respondents' petitions for removal did not state a removable cause within the meaning of 28 U.S.C. 1443(1) and in remand-

ing the causes to the District Court for an evidentiary hearing on the truth of respondents' allegations in the petitions for removal; whether the petitions for removal alleged sufficient facts under 28 U.S.C. Section 1446(a) upon which removal jurisdiction could be based under 28 U.S.C. Section 1443; and whether the violation of respondents' rights under the equal protection clause of the Fourteenth Amendment by the acts of state officials in arresting and charging respondents with violation of a state criminal statute, which statute is not violative on its face of said equal protection clause, entitles respondents to remove said state prosecutions to the federal court under 28 U.S.C. Section 1443(1).

STATUTES AND REGULATIONS WHICH THESE CASES INVOLVE.

1. 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

2. 28 U.S.C. Section 1446(a) which is as follows:

PROCEDURE FOR REMOVAL

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

3. The following sections of Mississippi Code Annotated of 1942, all of which are set forth in Appendix I, to-wit: 2089.5; 2291; 2296.5; 7185-13; 8576; 9352-21; and 9352-24.

4. The ordinance of the City of Greenwood, Leflore County, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Record of Ordinances of the said City, which appears in Appendix I hereto.

STATEMENT OF THE CASE.

The fourteen respondents in the *Peacock* case, according to their petitions for removal, were all arrested on March 31, 1964, in the City of Greenwood, Mississippi, and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942, set out in Appendix I. On April

3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, respondents filed fourteen separate petitions for removal in the United States District Court for the Northern District of Mississippi (Greenville Division); but they were filed in one jacket and each of said petitions was identical, except for the names of petitioners. The removal petitions alleged jurisdiction under both subsections of 28 U.S.C. Section 1443, and as grounds therefor set out that respondents were members of the Student Non-Violent Coordinating Committee and at the time of their arrest were "engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the federal Constitution and the Civil Rights Act of 1960, being 42 U.S.C. 1971 et seq." (r.3) Respondents also alleged as conclusions the following: that they were denied the equal protection of the laws inasmuch as they were arrested and charged under a state statute that is unconstitutional on its face and is unconstitutionally and arbitrarily applied as a part of the unconstitutional policy of racial segregation of the State of Mississippi and The City of Greenwood; that they cannot enforce their rights to freedom of speech and to petition and assemble under the First and Fourteenth Amendments; and that respondents were denied the privileges and immunities of the laws and due process of laws.

The *Weathers* case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi, under the claimed authority of 28 U.S.C. Section 1443(1) and (2). In that case there are fifteen respondents who, according to the allegations in the petition for

removal, were arrested at various times during the month of July, 1964, and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 7185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section 2089.5 of the Mississippi Code Annotated of 1942; assault; assault and battery; inciting to riot, believed to be in violation of Section 8576 of the Mississippi Code Annotated of 1942; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the respondents in the *Weathers case* are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. All of the petitions for removal are on mimeographed forms and therefore contain identical allegations respecting the grounds for removal, except that the blank space left on the said forms used for the factual allegations concerning respondents' arrests is, of course, filled in differently in each petition.

Respondents' petitions for removal in the *Weathers* case allege with respect to 28 U.S.C. Section 1443(1) that

respondents cannot enforce their equal civil rights under the Fourteenth Amendment in the Courts of the State for the following reasons, to-wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against respondents; under Mississippi law, custom and practice racially segregated courtrooms are maintained; in Mississippi courtrooms Negro witnesses and attorneys are addressed by their first names; local counsel are unavailable to respondents and Mississippi courts are closed to out of state attorneys; Mississippi judicial officials are elected in elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The respondents also alleged that they were entitled to remove their cases to federal court under the authority of 28 U.S.C. Section 1443(2).

In both the *Peacock* and *Weathers cases*, City filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not allege a removable case under either subsection of 28 U.S.C. Section 1443. It should be noted parenthetically here that the *Peacock case* was consolidated before judgment and that the 18 separate causes in the *Weathers case* were consolidated for purposes of appeal after judgment in the District Court on motion of respondents.

The District Court in ordering these cases remanded held that removal jurisdiction under Section 1443(1) could not be invoked where the petitions for removal

alleged only that the petitioners' rights under the equal protection clause of the Fourteenth Amendment had been violated by their arrest under a state statute which was valid on its face; that the presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them, precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices perpetrated by others in the course of a criminal prosecution. In other words, the District Court followed and applied the decisions of this Court in *Kentucky vs. Powers*, 1906, 201 US 1, 50 L. Ed. 633; *Strauder vs. West Virginia*, 1879, 100 US 303, 25 L. Ed. 664; *Virginia vs. Reeves*, 1870, 100 U.S. 313, 25 L. Ed. 667; *Neal vs. Delaware*, 1881, 103 U.S. 370, 26 L. Ed. 567; *Bush vs. Kentucky*, 1883, 107 U.S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354; and *Gibson vs. Mississippi*, 1896, 162 U.S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075. The District Court further held that the use of the words "under color of authority derived from any law providing for equal rights" in Section 1443(2) referred to one acting in an official or quasi-official capacity and that since respondents' petitions for removal did not show such capacity in respondents, the causes were not removable under Section 1443(2) either.

The respondents in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the *Peacock case* (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in the *Peacock case* on June 22, 1965. The said Court of Appeals in the *Peacock case* affirmed the District Court's holding re-

garding Section 1443(2) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals held that the unconstitutional application by state officials of a state criminal statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the federal constitution is sufficient to entitle such person to remove his case to federal court, at least where the alleged denial of his rights arose out of his arrest and charge. The said Court apparently limited the United States Supreme Court cases beginning with *Kentucky vs. Powers, supra,* to holding that the unconstitutional administration by state officials of a state statute or constitutional provision in violation of one's equal civil rights is insufficient to ground removal only where Negroes are systematically excluded in the selection of grand and petit juries by such officials.

On July 20, 1965, the Court of Appeals for the Fifth Circuit sustained the respondents' motion for summary reversal in the *Weathers case,* holding that the issues in that case were identical with and therefore controlled by said Court's opinion in the *Peacock case.*

ARGUMENT.

1. In not affirming these two cases, the Court of Appeals decided a federal question, namely, the scope of removal jurisdiction under 28 U.S.C. Section 1443(1) contrary to all prior decisions of the United States Supreme Court and contrary to all the decisions of other federal courts in other circuits on this issue.

The holding of the District Court in the *Peacock* and *Weathers cases* as regards 28 U.S.C. Section 1443(1) is directly in conformity with, and required by, all those United States Supreme Court decisions cited above. The two leading cases on this point are *Kentucky vs. Powers, supra*, and *Virginia vs. Reeves, supra*. In *Virginia vs. Reeves*, the defendants, two colored men, were indicted for murder in the state court and attempted removal to federal court before trial alleging that Negroes were eligible to serve as jurors in Virginia but that the grand jury which had indicted them and the petit jurors summoned to try them were all white; that the state judge refused to require a portion of the petit jury to be composed of Negroes; that Negroes had never been permitted to serve as either grand or petit jurors in the county and that a strong prejudice existed in the community against defendants because they are negroes and they cannot therefore obtain a fair trial. The state court denied the petition for removal and the defendants were convicted but this conviction was set aside. Defendants were then tried separately after having renewed their petition for removal which was denied a second time and one of the defendants was convicted and the other obtained a hung jury. At this stage of the proceeding the federal court in Virginia upon defendants' petition docketed the two causes and issued a habeas corpus cum causa. The State of Virginia sought a writ of mandamus from the United States Supreme Court to require the federal judge to redeliver the defendants to the custody of the state. The United States Supreme Court issued the writ of mandamus holding that the removal of the cases was improper. In so holding the Court said:

The petition of the two colored men for the removal of their case into the Federal Court does not appear to have made any case for removal, if we are correct in our reading of the Act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is, that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of Strauder v. West Va., just decided (ante, 664) that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused

to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the Act of Congress of March 1, 1875, 18 Stat. at L. 335, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional Amendment. But, inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a "denial or disability to enforce in the judicial tribunals of the State" the rights of colored men, as is contemplated by the removal Act, Section 641.

In *Kentucky vs. Powers supra*, the defendant had attempted removal from the state court to federal court under an earlier enactment of Section 1443(1) on the ground, among others, that his rights to equal protection of the laws were violated by the unconstitutional manner in which the jury had been selected in his previous trials and would be selected in that proceeding. In spite of finding that "the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice," the United States Supreme Court still denied jurisdiction. It held that "a circuit court of the United States has not been authorized to take cognizance of a criminal proceeding commenced in a state court for an alleged crime against the state where the constitution and laws of such state do not permit discrimination against the accused in respect to such rights as are specified in the first clause of Section 641 (later Section 1443)." The rationale of

the above rule announced by the United States Supreme Court in these decisions is best summarized in the opinion of the United States District Court for the Northern District of Mississippi in that case styled *City of Clarksdale vs. Gertge, supra,* as follows:

> Under subsection 1 of the statute a state criminal prosecution may be removed by the defendant if he is "denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States." Since 28 U.S.C. Section 1446(c) requires removal of criminal prosecutions under Section 1443 to be effected before trial the facts upon which the right to remove depends must be such as will appear before trial. The petition must allege before trial that the state court *will* deny petitioner's rights on trial.
>
> The presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them not only precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices perpetrated by others in the course of a criminal prosecution but the presumption also requires the federal court to act upon the expectation that the state court will be governed by the state constitution and statutes as construed by the highest court of the state. It follows that the only standard for invoking jurisdiction under 28 U.S.C. Section 1443(1) is a finding that petitioner will be denied a federally guaranteed equal civil right on trial as a result of the state constitution, a statute, municipal ordinance, rule of court, or other regulatory provision binding on the court in petitioner's trial so that the state court may be presumed in advance to obey such discriminatory

provision. If no such deprivation of right is shown and remand is ordered, petitioner is not without remedy. If, contrary to the presumption, the state court permits an infringement of the petitioner's equal civil rights, he may seek relief on appeal to the higher courts of the state and ultimately, if necessary, to the United States Supreme Court.

The opinion of the United States Court of Appeals for the Fifth Circuit in the *Peacock case* does not distinguish these Supreme Court cases, but attempts to limit their application to the particular narrow factual situations involved therein by saying that these cases hold merely that in establishing removal jurisdiction it is only necessary for the face of state legislation to deny one's equal rights where such denial is the systematic exclusion of Negroes from grand and petit juries; and that the unconstitutional administration of valid state legislation by acts of officials is sufficient to ground removal in all other cases—at least where the unconstitutional acts of the officials are committed in the arrest and charging stage.

It is submitted that the holding of the United States Supreme Court in the above cases is much broader than the United States Court of Appeals for the Fifth Circuit seems to believe. For instance, the Supreme Court in *Virginia vs. Rives* remarked:

> The denial of rights or the inability to enforce them to which the section refers is in my opinion such as arises from *legislative action of the state* as for example an act excluding colored persons from being witnesses, making contracts, acquiring property and the like. With respect to obstacles to their enjoyment

of rights arising from other causes persons of the colored race must take their chances of removing or providing against them with the rest of the community.

It would seem to petitioner here that the more logical conclusion to draw from the opinions of the United States Supreme Court in these cases is that any unconstitutional acts of officials not under a state statute unconstitutional on its face under the equal protection clause or violative of some other federal statute providing for equal civil rights will not support such removal jurisdiction. Of course, the Court of Appeals is correct in saying that state courts must abide by the federal constitution in striking down unconstitutional state statutes; but the Supreme Court was interpreting an Act of Congress and it recognized that practicality dictates some limit to federal jurisdiction, and therefore held that the line in removal jurisdiction under Section 1443 was drawn by Congress between those cases where one's equal civil rights were denied by a state statute and those cases where they were not. Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors. And yet the Court of Appeals seems to feel such was the Congressional intent because that court would make a distinction between those cases where the denial of the equal civil rights was sustained

in the judicial processes and those where the denial was sustained in the arrest and trial stage of a criminal proceeding. The distinction, of course, cannot be that one group of cases pertains to a denial before trial and the other during trial because as pointed out by the Court of Appeals such a denial in the selection of a grand jury would appear before trial, and the Supreme Court has already ruled in that instance that such a denial must be by the face of state legislation. The only reason advanced by the Court of Appeals for making this distinction is because it says that it may be that because the systematic exclusion question goes to the "very heart of the state judicial process," Congress may have felt that this should be left to the state courts to correct. The opposite of this would seem to be true to petitioner; that is, that because the systematic exclusion question does go to the very heart of the state judicial processes it would seem more reason for Congress to have believed that one who has been so denied his constitutional right would be less likely to be able to enforce his rights in the courts of the state and therefore more in need of federal jurisdiction.

In addition to the above the Court of Appeals in these two cases held that it was bound by *Rachael vs. Georgia*, 342 F. 2d 336 (CCA 5th 1965), but petitioner respectfully submits that the court is in error in this regard. The majority of the court in *Rachael vs. Georgia* expressly avoided the question presented here. *Rachael* at page 339. The difference as it appears to City between the *Rachael case* and these cases here is that the Georgia statute in *Rachael* was contrary to the Civil Rights Act of 1964 on its face because it made it a crime for a person

to do that which the Civil Rights Act of 1964 gave him a right to do and for which it forbid his prosecution. Respondents in these cases can show no federal statute or constitutional provision which gives them the right to do anything for which they can be prosecuted under the state statutes they are charged with violating. None of the statutes alleged in any of the petitions for removal (see Appendix I) are unconstitutional on their face under the equal protection clause of the Fourteenth Amendment or under any federal statute.

Petitioners respectfully represent unto the Court that the rule announced by the United States Court of Appeals for the Fifth Circuit is not only contrary to the decisions of the United States Supreme Court in construing Section 1443(1), but is contrary to the following decisions of federal district courts, to-wit: *In re Hagewood's Petition*, 200 Fed. Sup. 140 (Ed Mich. 1961); *State vs. Murphy*, 173 Fed. Sup. 782 (WD La. 1959); and *City of Birmingham vs. Crosskey*, 217 Fed. Sup. 947 (1963); *California vs. Chue Fan*, 42 Fed. 865 (Cal. 1890); and *New Jersey vs. Weinberger*, 38 Fed. 2d 298 (D.C.N.J. 1930).

2. Petitioner represents unto the Court that even if the decisions of the United States Court of Appeals for the Fifth Circuit are not contrary to the decisions of this Court, review of these cases should still be had by this Court because under the Court of Appeals decision almost any person charged in police court with a violation of law can remove his case to federal court by alleging the arresting officer in arresting and charging him had the improper motive of intending to deprive him of some equal

right guaranteed him by federal law; and he can do this in face of the fact that the only right of removal given him by the federal statute is where he "is denied or cannot enforce in the courts of such state" such equal right and in the face of the presumption that the state court will give him his rights by properly applying the law.

The burden this will place not only on the finances of local communities but on the already glutted federal docket is strongly indicated by the number of respondents and the type cases in which removal was attempted here, which range from the use of profanity in a public place to reckless driving and driving an automobile without a proper license tag. One has only to look through the current law reports and the annotated supplement to 28 U.S.C.A. Sec. 1443 to realize the increasing number of these so-called civil rights cases for which removal is being attempted. The Clerk of the U. S. District Court for the Northern District of Mississippi tells us that approximately 672 defendants in criminal prosecutions in municipal police courts have removed their cases to his court. Local communities cannot bear the expense of prosecuting their police court cases in federal court, and the effect on the lower federal courts of giving them jurisdiction of this multitude of police court cases is obvious.

Of course, City would point out here that the very fact that the decisions of the Court of Appeals has such far-reaching practical effect on the federal judicial structure indicates that Congress itself intended no such construc-

tion and that such a broadening of federal jurisdiction should come only from the United States Congress.

Respectfully submitted,

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CERTIFICATE.

The undersigned counsel of record for the petitioner, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing petition has been this day forwarded by United States mail, postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents.

This the day of August, 1965.

AUBREY H. BELL,
Of BELL & McBEE,
Howard Street,
Greenwood, Mississippi.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION.

No. GCR6414

THE CITY OF GREENWOOD, MISSISSIPPI,

versus

WILLIE PEACOCK, ET AL.

MEMORANDUM OPINION ON MOTION TO REMAND.

Fourteen petitions for removal of criminal prosecutions pending in the Police Court of the City of Greenwood, Mississippi were filed in this court in one jacket file as a matter of convenience and economy to the petitioners. These petitions were originally captioned as if a new civil case was being instituted and the jacket file was originally given a docket number on the civil docket of this court. However, after the cases were filed and on the request and petition of those removing here, the caption was ordered changed to that shown above and docketed on the criminal docket of the court.

The City of Greenwood filed a motion to remand, as well as an answer on the merits, and its motion to remand is now for consideration and disposition by the court on briefs of the parties. The briefs are directed to the face of the papers only and the matter will be thus considered.

After the original documents were filed, an order was entered on a petition for a writ of habeas corpus directing the Marshal of the Northern District of Mississippi to take the defendant petitioners into his custody, but without prejudice to the rights of the City of Greenwood to press its motion to remand.

On the same day that the aforementioned order was entered, this court entered an order, on informal application of the defendant petitioners, fixing bail at from $100 to $200 each for all but one of them and the other defendant petitioner, Fred Harris, was released to the custody of his parents and allowed to remain in their custody pending further order or notice from this court. All of the other defendant petitioners promptly posted bail bonds which were approved and they were released on that bail.

The procedural basis for the removal of these cases to this court is found in § 1443, United States Code, which reads as follows:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "(2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do any act on the ground that it would be inconsistent with such law."

The petitions by which jurisdiction of this court was invoked were *verified only by counsel and not yet has any copy of any state court process, pleading or order been filed with this court.* These petitions each recite that the petitioner was arrested in Greenwood, Mississippi, and subsequently charged with the violation of Mississippi Code, § 2296.5, by obstructing public streets and is to be tried on said charge in the City Court of Greenwood, Mississippi. Each of these petitions also alleges that the petitioner is affiliated with a civil rights organization and that the petitioner was engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote and contains conclusory allegations of rights under the First and Fourteenth Amendments and that the state statute under which the prosecutions were instituted is vague, indefinite and unconstitutional on its face.

In a case which involved a Negro who was tried for murder in the state court three times, convicted each time and each time the state's highest court reversed, who removed his case, before a fourth trial, to the federal court on the basis of an earlier enactment of the statute with which this court is now concerned, on appeal which was then permitted on the denial of a motion to remand, even though finding that "the trials of the accused disclosed such misconduct on the part of administrative officers connected with these trials as may well shock all who love justice * *", held that the removal was erroneous and in doing so said:

"In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 'who is denied or cannot enforce in the judicial tribunals of the state * * any right secured to him by any law providing for the equal civil rights * * *' did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court." *Kentucky v. Powers*, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 705 (1906).

In *Gibson v. Mississippi*, 162 U. S. 565 (1896) it was said:

"Whether a particular statute, which does not discriminate against a class of citizens in respect of their civil rights, is applicable to a pending criminal prosecution in a state court, is a question in the first instance, for the determination of that court, and its right and duty to finally determine such a question cannot be interfered with by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate review is in this court whenever such rights are de-

nied by the judgment of the highest court of the state in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, upon the state courts, equally with the courts of the union, thus the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them, and if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination."

The rule followed in the *Powers* case and in the *Gibson* case has never been reversed, or distinguished, so far as counsel have pointed out or so far as this court has been able to determine. For example, in *The City of Birmingham, Alabama v. Crosskey*, 217 F. Supp. 947 (1963), it was held:

"It is only where state legislation exists, interfering with the person's right of defense, that such person can have the cause removed. (D. C. N. J. 1930) State of New Jersey v. Weinberger, 38 F. 2d 298. A case may not be transferred unless some substantive or procedural rule of state law, as distinguished from actions of officials in disregard of state law, deprives

a defendant of equal civil rights. In re: Hagwood(s) Petition, (D. C. Mich. 1961), 200 F. Supp. 140."

In *Steele* the Superior Court of California, 164 F. 2d 781 (9 Cir. 1948) where the defendant was charged with a violation of a state statute on bookmaking, plead not guilty and filed a petition for removal under § 1443, United States Code, alleging that his constitutional rights of due process and under the Fourteenth Amendment and to be secure in his home against unreasonable search and seizure were violated and that the California procedure allowed unlawful evidence to be used against him, the district court refused removal and the Court of Appeals affirmed, saying:

> "If in the procedure adopted by the California courts and by it *equally* applied to all citizens of the United States, there lurks a violation of other rights guaranteed by the Fourteenth Amendment, that fact alone is not sufficient to justify removal to the U. S. District Court. *We hold that in order to authorize removal as provided by Section 1443, a violation of the equal protection clause of the Fourteenth Amendment must be shown.* Some equal civil rights must be denied, such as discrimination against a particular race." (Court's emphasis.)

It seems, at this time, well settled then that 28 U. S. C., § 1443 authorizes removal of a criminal case from a state court to a federal court only when the Constitution or laws of the state deny or prevent the enforcement of equal rights secured to one by the Constitution or laws of the United States, and not where the equal rights of citizens are recognized or are not denied by the Constitution or laws of the state. It is only when hostile state

constitutional provision or state legislation exists which interferes with a person's right of defense that the case can properly be removed to federal court. There is no right to removal where the alleged denial of, or inability to enforce any such right results from the corrupt, illegal or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all persons alike. See 76 C. J. S., *Removal of Causes*, § 94; 45 Am. Jur., *Removal of Causes*, § 109 and *State of Arkansas v. Howard*, 218 F. Supp. 626 (ED Ark. 1963).

There is a line of cases, consistent with the foregoing, which does permit removal under § 1443 (or its predecessors) where there is a state law which shows on its face that it discriminates in violation of the Federal Constitution or Federal law or that it denies rights guaranteed under the Federal Constitution or Federal law. See, for example, *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664. But this is not the case here, as will be seen.

§ 2296.5, Mississippi Code Annotated, 1942, as amended, provides:

> "1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor * * *"

The phrase "any person or persons" encompasses people of all races and of all stations. It is not directed to any classification of people by reason of race or because of

any other criterion. It is not unconstitutional under the equal protection clause of the Fourteenth Amendment of the Federal Constitution and it is of no consequence with respect to the issue now before this court as to how this law was, is, or will be administered—fairly, unfairly, equally, discriminatorily, corruptly, harshly or humanely.

In spite of what seems to be settled law, however, counsel for these removing petitioners earnestly and with skill urges that a solution of the problem now before this court must be approached "in the spirit of the new vitality brought to the Fourteenth Amendment by the recent decisions" so as to overrule the authority heretofore cited. But, until the Court of Appeals for this circuit or the Supreme Court speaks to the contrary, this court is bound to follow the law as it exists at this time.

And counsel for petitioners urges that since the petitions allege that these removing parties were engaged in a voter registration drive that this is action under color of authority of both 42 U. S. C. 1971 and the Federal Constitution and that thus they are given rights which they cannot enforce in the state courts and are thereby entitled to removal under § 1443. Petitioners allege that they were arrested for wilfully obstructing the public streets of Greenwood; that they are members of a civil rights organization engaged in advancing rights of Negroes and were "at the time of arrest engaged in a voter registration drive * *" assisting Negroes to register so as to enable them to vote. Petitioners do not state that they themselves were attempting to register to vote nor do they state what was being done by them while they were "engaged in a voter registration drive". They do not

tate any specific acts undertaken pursuant to their gen-
ral engagement in a voter registration drive, other than
nat they were arrested for blocking a public street. They
o not state that they were acting in furtherance of any
ights personal to them under 42 U. S. C. 1971, but the
etitions simply allege "nor can he (petitioner) act under
uthority of the aforementioned provisions of the Federal
onstitution and 42 U. S. C. A. 1971 providing for equal
rotection and equal rights * *". They say that this,
ithout more, entitles them to remove a criminal case
gainst them for wilfully obstructing the free use of a
ublic way and base this contention partly on § 1443 (2),
hich authorizes removal of criminal prosecution.

"* *

"(2) for any act under color of authority derived from any law providing for equal rights * *."

There is nothing on the face of the language of § 1971
hich would give petitioners (or any other individual)
ny authority or even any right, to assist others to vote,
r to engage in a voter registration drive.

Admittedly none of the cases cited by petitioners fit
he situation presented by the motion to remand when it
viewed in the light of § 1443 (1). But, with respect to
2) of that section, counsel cites the case of *Hodgson v.*
illward, 12 Fed. Cas. No. 6568, 3 Grant cases, 418 (C. C.
a. 1863) as the only case that could be found under
1443 (2). But, this case involves "the fifth section of
he Act of 3rd March, 1863 (12 Stat. 756)". That section
that law provides for the removal of an action against
deral officers for any tortious acts committed by them
uring the "rebellion" under color of authority of a presi-

dential order or act of Congress. There is nothing in that law pertaining to equal rights or the removal of cases involving equal rights. And this case illustrates the point that "color of authority" does not mean the act of a mere individual by holding as follows:

> "For the purposes of this case it is enough to say, that an officer, acting in good faith under a warrant purporting to come from his superiors whom he is bound to obey, is acting under 'color of authority' ".

Petitioners were not and do not claim to have been federal officers acting under color of authority of any warrant or other document which they were bound to follow. Hence, the *Hodgson* case has no application here.

In summary, since no discriminatory state constitutional provision or state statute are claimed, petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States. If any such rights are withheld or denied, they may take their case to the higher courts of Mississippi and then to the Supreme Court of the United States for "final and conclusive determination".

For the reasons stated, it is concluded that the cases were improvidently removed and that this court is without jurisdiction. An order will be entered sustaining the motion of the City of Greenwood to remand and remanding all the cases to the Police Court of that city for trial or other disposition according to the laws of the State of Mississippi.

This the 17th day of June, 1964.

CLAUDE F. CLAYTON,
District Judge

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION.

No. GCR6435.

CITY OF GREENWOOD, MISSISSIPPI,

versus

DOROTHY WEATHERS, ET AL.

No. GCR6436.

CITY OF GREENWOOD, MISSISSIPPI,

versus

DOROTHY WEATHERS.

No. GCR6437.

CITY OF GREENWOOD, MISSISSIPPI,

versus

ARANCE BROOKS.

No. GCR6438.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE H. ALBERTZ.

No. GCR6439.

CITY OF GREENWOOD, MISSISSIPPI,

versus

FRED HARRIS, JOHN HANDY.

No. GCR6440.

CITY OF GREENWOOD, MISSISSIPPI,

versus

MONROE SHARP.

No. GCR6441.

CITY OF GREENWOOD, MISSISSIPPI,

versus

JOHN PAUL.

No. GCR6442.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE ALBERTZ.

No. GCR6443.

CITY OF GREENWOOD, MISSISSIPPI,

versus

GEORGE ALBERTZ.

No. GCR6444.

CITY OF GREENWOOD, MISSISSIPPI,

versus

WILLIAM W. HODES.

No. GCR6445.

CITY OF GREENWOOD, MISSISSIPPI,

versus

BENJAMIN McGEE a/k/a SILAS McGEE.

No. GCR6446.

CITY OF GREENWOOD, MISSISSIPPI,

versus

FRED GORDON.

No. GCR6447

CITY OF GREENWOOD, MISSISSIPPI,

versus

RUTH TURNER.

No. GCR6448.

CITY OF GREENWOOD, MISSISSIPPI,

versus

ROBERT MASTERS

MEMORANDUM OPINION AND ORDER.

These cases originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal prosecutions from the Police Court of the City of Greenwood, Mississippi. In each case, Greenwood has filed a motion to remand, and these motions are now before the court on opposing briefs which treat all the cases as consolidated, because of the similarity of issues involved.

In none of the cases have the affidavits upon which the state prosecutions are based been made a part of the record, but counsel agree in their briefs as to the nature of the offenses charged and the statutory provisions defining those offense. It is not disputed that the offenses are limited to violations of statutes or ordinances which are not discriminatory on their faces, e. g., assault and battery, resisting arrest, reckless driving, etc. Defendants do not show that any state statutory or constitutional provisions are discriminatory on their faces so as to deprive them of their equal civil rights on trial of these charges in the state court. Defendants' argument is that discriminatory enforcement of these non-discriminatory ordinances will so operate, but this argument is of no avail in determining this court's jurisdiction on removal. These cases are governed by the opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto, and under the rule announced in that case, they were improvidently removed and this court is without jurisdiction.

Therefore, it is,

ORDERED:

1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.

2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.

3) That the motions to remand shall be, and the same hereby are, sustained.

4) That these causes shall be, and the same hereby are, remanded to the Police Court of City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.

5) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION.

No. GCR6451.

CITY OF GREENWOOD, MISSISSIPPI,

versus

JOHN HANDY.

MEMORANDUM OPINION AND ORDER.

This cause originated in this court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Greenwood, Mississippi. The City filed a motion to remand, and the defendant filed a motion for an order granting an evidentiary hearing. These motions are now before the court.

Contrary to the *Rules Governing the Removal of Criminal Prosecutions* promulgated by an order of this court on 27 August, 1964, defendant has not furnished the court with a copy of the affidavit upon which the state prosecution is based, nor an affidavit of counsel setting forth the steps taken to procure such a copy and the reasons for the failure to obtain such a copy. This defect is pointed up by the fact that defendant's petition alleges that he is charged "with the alleged offense of inciting to riot, believed to be a Mississippi Statute No. 8576," while counsel for the City state in their brief that the offense is of common-law origin. The vagueness of the various papers in the record prevents the court from knowing precisely with what offense defendant is charged.

The burden is on the defendant as a petitioner for removal, however, to present sufficient grounds for removal, and defendant has not pointed to any state constitutional or statutory provision which is discriminatory on its face so that it can be found that defendant will be deprived of his equal civil rights on trial in the state court. A search by the court of those statutes which may relate to the offense of inciting to riot has produced no such discriminatory statute, and obviously if, as the City contends, the offense is of common law origin, there could be no basis for saying the legal source of the charge is discriminatory. Therefore, this case is controlled by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), and there is no basis for this court's assumption of jurisdiction.

In this view of the law, an evidentiary hearing on the allegations of fact contained in the opinion, which amount to allegations of discriminatory application of non-discriminatory state laws, would serve no purpose. Defendant's motion to this end will be overruled.

The removal of this case was improvident and this court is without jurisdiction. Therefore, it is,

ORDERED:

1) That this cause, which was improperly filed by the defendant and received by the Clerk with the style of the case including the State of Mississippi as a party, when the style should have been identical to the style of the same case in the state court, shall be styled as in this Memorandum Opinion and Order.

2) That the Clerk shall change the style of the files and records in this cause to conform to the style of this order.

3) That the motion of John Handy for an order granting and fixing a date for hearing and presentation of proofs, shall be, and the same hereby is, overruled.

4) That the motion to remand shall be, and the same hereby is, sustained.

5) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the cause on appeal. Defendant, John Handy, is hereby notified that upon expiration of such a stay, he must abide by the terms and conditions of the bond previously posted by him with the Police Court of the City of Greenwood, Mississippi.

6) That the Clerk of this court is directed to serve promptly on the defendant, John Handy, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON,
(Claude F. Clayton),
District Judge.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION.

No. GCR6453.

CITY OF GREENWOOD,

versus

JESSIE HARRISON.

No. GCR6454.

CITY OF GREENWOOD,

versus

ANNA RUTH TURNER.

MEMORANDUM OPINION AND ORDER.

These cases are identical in every respect and will be treated together. They originated in this court by the filing of petitions pursuant to 28 U. S. C. § 1443 to remove criminal prosecutions from the Police Court of the City of Greenwood. In each case, Greenwood has filed a motion to remand and the defendants have filed motions for orders granting and fixing a date for hearing and presentation of proofs. These motions are now before the court.

Defendants have not complied with the *Rules Governing The Removal of Criminal Prosecutions* promulgated by order of this court on 27 August, 1964, in that they filed neither a copy of the affidavit upon which the state prosecution is based, nor, in the alternative, an affidavit

by counsel showing the steps taken to procure such a copy and the reasons for failure to obtain one. The only source of information available to the court is the allegation of the petitions that defendants are charged "with the alleged offense of Disturbance in a Public Place, believed to be an ordinance of the City of Greenwood." In petitioning for removal, the burden is on the defendant to show adequate grounds therefor, and under the settled law, removal is not available under 28 U. S. C. § 1443 unless some state constitutional or statutory provision is discriminatory on its face so as to deprive the defendant of his equal civil rights on trial in the state court. Defendants have failed to inform the court by the required copy of the affidavit, or by any other means, of any ordinance of the City of Greenwood or constitutional or statutory provision of the State of Mississippi which would bring these cases within the rule stated above. The cases are therefore governed by the decision of this court in *City of Clarksdale v. Gertge*, No. DCR6448 (December 23, 1964), a copy of which is attached hereto.

Under this view of the law, the allegations of the petition cannot affect the result, even if true. An evidentiary hearing would thus serve no useful purpose and defendants' motions to this end must be overruled.

These cases were improvidently removed and this court is without jurisdiction. Therefore, it is,

ORDERED:

1) That these causes, which were improperly filed by the defendants and received by the Clerk with the style of the cases including the State of Mississippi as a party, when the style should have been identical to the style of

the same cases in the state court, shall be styled as in this Memorandum Opinion and Order.

2) That the Clerk shall change the style of the files and records in these causes to conform to the style of this order.

3) That the motions of Jessie Harrison and Anna Ruth Turner for orders granting and fixing a date for hearing and presentation of proofs shall be and the same hereby are, overruled.

4) That the motions to remand shall be, and the same hereby are, sustained.

5) That these causes shall be, and the same hereby are, remanded to the Police Court of the City of Greenwood, Mississippi. This remand, however, shall be, and the same hereby is, stayed for a period of ten days, provided that if notice of appeal is filed during that period, the stay shall be effective until final disposition of the causes on appeal. Defendants, Jessie Harrison and Anna Ruth Turner, are hereby notified that upon expiration of such a stay, they must abide by the terms and conditions of the bonds under which they were released from custody by the Police Court of the City of Greenwood, Mississippi.

6) That the Clerk of this court is directed to serve promptly on the defendants, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION.

No. GCR6462.

CITY OF GREENWOOD,

versus

LAURA McGHEE.

MEMORANDUM OPINION AND ORDER.

This case originated in this Court by the filing of a petition pursuant to 28 U. S. C. § 1443 to remove a criminal prosecution from the Police Court of the City of Greenwood, Mississippi. The City filed a motion to remand and the defendant filed a motion for an order granting a hearing for the presentation of proof in support of the factual allegations of the removal petition. These motions are now before the court.

The affidavit upon which the Police Court prosecution is based charges defendant with assault and battery, in violation of the ordinances of the City of Greenwood. The ordinance in question cannot be said to be discriminatory upon its face, nor does an examination of all the papers

in the record before the court produce any statutory or constitutional provision of the State of Mississippi which will deprive defendant of her equal civil rights on the trial of this case. This case is therefore governed by the opinion of this court in *City of Clarksdale, Mississippi v. Gertge*, No. DCR6448 (December 23, 1964).

The allegations of fact in the petition are, in substance, allegations that defendant will be deprived of her equal civil rights on trial in the Police Court as a result of discriminatory application of non-discriminatory state laws. Since, as noted in the *Gertge* opinion, such circumstances, even if true, would not authorize removal, no purpose can be served by granting an evidentiary hearing, and the defendant's motion to this end must be denied.

It follows that removal was improvident and this court is without jurisdiction. Therefore, it is,

ORDERED:

1) That the motion of Laura McGhee for an order granting and fixing date for hearing and presentation of proofs shall be, and the same hereby is, overruled.

2) That the motion of the City of Greenwood to remand shall be, and the same hereby is, sustained.

3) That this cause shall be, and the same hereby is, remanded to the Police Court of the City of Greenwood,

Mississippi. Defendant, Laura McGhee, is hereby notified that she must abide by the terms and conditions of the bond previously posted by her with the Police Court of the City of Greenwood, Mississippi.

4) That the Clerk of this court is directed to serve promptly on the defendant, Laura McGhee, on all counsel of record, and upon the Clerk of the Police Court of the City of Greenwood, Mississippi, certified copies of this opinion and order by certified mail, and to note such service on the docket.

This the 30th day of December, 1964.

(S.) CLAUDE F. CLAYTON
(Claude F. Clayton)
District Judge

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, DELTA DIVISION.

No. DCR6448.

CITY OF CLARKSDALE, MISSISSIPPI,

versus

MARIE GERTGE.

MEMORANDUM OPINION.

This case originated in this court by the filing of a petition pursuant to 28 U. S. C. §1443 to remove a criminal prosecution from the Police Court of the City of Clarksdale, Mississippi. Clarksdale filed a motion to remand and that motion is before the court for disposition on briefs which are directed to the face of the papers. The motion will be so considered.

The petition recites that petitioner is a white female affiliated with a civil rights organization, that she was arrested and charged with violating a city ordinance in that she was accused of taking a photograph within the Clarksdale City Hall without the permission of the Mayor and Commissioners of that city, that she was later released on $100 cash bail, and that her prosecution for this offense is pending in the Clarksdale Police Court, but that she has not yet been tried. As grounds for removal, it is alleged that petitioner was present in Clarksdale as a

participant in a voter registration drive directed at Negroes and that her arrest and prosecution were for the purpose of harassing her and preventing her from carrying on lawful and constitutionally protected activities in the voter registration drive, pursuant to a policy of discrimination which is encouraged and enforced by all three branches of the state government. Prevailing community opinion is alleged to be hostile to petitioner and other civil rights workers, making it impossible for her to employ a member of the Mississippi Bar to represent her.

The petition alleges that the Police Court of Clarksdale and the Circuit Court of Coahoma County[1] are hostile to petitioner by reason of the commitment of those courts to enforce the state's policy of racial segregation, which is allegedly demonstrated by maintenance of racially segregated courtrooms and by the practice of addressing Negro witnesses and attorneys by their first names, in violation of the equal protection clause of the Fourteenth Amendment; by the election of judges at elections in which Negroes have been denied the right to vote, in violation of the Fifteenth Amendment; by systematic exclusion of Negroes from juries by reason of race, in violation of the Sixth and Fourteenth Amendments; and by the exactment of excessive, exorbitant and discriminatory bail in the cases of defendants charged with offenses arising out of the exercise of their equal civil rights, in violation of the Eighth and Fourteenth Amendments.

[1] The circuit court is apparently included on the mistaken belief that an appeal would lie there for trial *de novo* upon conviction in the police court. Coahoma County has a county court to which such an appeal would lie in the first instance.

As a result of the foregoing, petitioner claims she is being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal rights, particularly the First, Fourteenth and Fifteenth Amendments to the Constitution and 42 U. S. C. § § 1971, 1983 and 1985. She allegedly has been and is being denied, and cannot enforce in the courts of the State of Mississippi, rights under the said federal constitutional and statutory provisions for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

Clarksdale's motion to remand is on the ground that the petition does not show on its face that petitioner was or is being deprived of any equal civil right by any substantive or procedural rule of law of the State of Mississippi or any ordinance of the City of Clarksdale, and that absent such a showing, this court is without jurisdiction under 28 U. S. C. § 1443. That statute reads:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do an act on the ground that it would be inconsistent with such law.

The question of whether there is a right to remove or not is jurisdictional. Thus, congressional authority must be found for this court's assumption of jurisdiction. Absent such authority, the right must be denied regardless of the persuasiveness of petitioner's appeal for aid. Here, perhaps more than in many other areas of federal jurisdiction, the delicate balance of a federal system is at stake and for this reason it has been repeatedly held that the removal statutes must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U. S. 100 (1941).

I.

Under subsection (1) of the statute, a state criminal prosecution may be removed by the defendant if he "is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States." Since 28 U. S. C. § 1446 (c) requires removal of criminal prosecutions under § 1443 to be effected before trial, the facts upon which the right to remove depends must be such as will appear before trial. The petition must allege before trial that the state court *will* deny petitioner's rights on trial.

The presumption that courts of competent jurisdiction will obey the rules of law applicable to litigation before them, not only precludes a federal court from surmising that the state court will unlawfully discriminate against a defendant or that it will fail to correct injustices per-

petrated by others in the course of a criminal prosecution, but the presumption also requires the federal court to act upon the expectation that the state court will be governed by the state constitution and statutes, as construed by the highest court of the state. It follows that the only standard for invoking jurisdiction under 28 U. S. C. § 1443 (1) is a finding that petitioner will be denied a federally guaranteed equal civil right on trial as a result of the state constitution, a statute, municipal ordinance, rule of court or other regulatory provision binding on the court in petitioner's trial so that the state court may be presumed in advance to obey such discriminatory provision. If no such deprivation of right is shown and remand is ordered, petitioner is not without remedy. If, contrary to the presumption, the state court permits an infringement of the petitioner's equal civil rights, he may seek relief on appeal to the higher courts of the state, and, ultimately, if necessary, to the United States Supreme Court.

The foregoing rationale is the foundation of those decisions which have repeatedly construed subsection (1) with such consistency that certain principles may be taken as settled. In order to authorize a removal, a violation of the equal protection clause of the Fourteenth Amendment must be shown. The fact that other rights guaranteed by the Fourteenth Amendment are violated will not authorize a removal where the procedure adopted by the state authorities is applied equally to all citizens, *Steele v. The Superior Court of California*, 164 F. 2d 781 (9th Cir. 1948). The denial of right must result from provisions of the state constitution or statutes as construed by the highest court of the state, which deny or prevent the

enforcement of equal rights secured to the defendant by the Constitution or laws of the United States, rather than through the illegal and discriminatory acts of state officials or individuals where such acts are not authorized by state law. *Virginia v. Rives*, 100 U. S. 303 (1879); *Kentucky v. Powers*, 201 U. S. 1 (1905). Where the denial of rights arises from such wrongful acts of state officials, not authorized by state law, the remedy is to be found in the state courts, trial and appellate, and ultimately in the Supreme Court of the United States, if necessary. *Hull v. Jackson County Circuit Court*, 138 F. 2d 820 (6th Cir. 1943).

Petitioner takes issue with these principles, however, and argues that Congress, in enacting the predecessor of 28 U. S. C. § 1443 (Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27) intended that fundamental unfairness in the operation of state courts should serve as a basis for removal, and (petitioner implies) that restrictive constructions of the statute by the Supreme Court in the latter part of the nineteenth century deviated from the intent of Congress by unduly emphasizing the necessity for a state statutory or constitutional infringement on equal rights; that these restrictions were nevertheless not absolute but would permit removal without such infringement if the fact that petitioner's rights would be denied in the state court could be shown with a sufficient degree of certainty, and that recent decisions of the Supreme Court in the area of civil rights indicate a purpose to allow a more liberal interpretation of congressional legislation designed to protect equal civil rights.

The first definitive construction of the civil rights removal statute was in *Virginia v. Rives, supra.* In that case, petitioners for removal alleged that they were Negroes charged with the murder of a white man in a community in which strong racial prejudice existed; that the grand jury which indicted them and the jurors summoned to try them were all white; that the court had refused a request for placement of a number of Negroes on the trial jury; and that, notwithstanding that state laws required jury service of males without discrimination as to race, Negroes had never been allowed to serve as jurors in the county. The court observed that there was no claim of a discriminatory state constitutional or statutory provision, and that if the officer charged with selection of veniremen had disregarded the state law so as to exclude Negroes because of race, he violated both state and federal law. Such criminal misuse of state law could not be said to be "such a 'denial or disability to enforce in the judicial tribunals of the State' the rights of colored men, as is contemplated by the removal statute." In that case, the court, inter alia, said:

> It is to be observed that act gives the right of removal only to a person "who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights." And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such case a defendant may affirm on oath what is necessary for removal . . . . But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused

party of a right which the statute law accords him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the state" the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong . . . . (But, if not) the error will be corrected in a superior court . . . . Denial of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court . . . .

Such explicit language does not suggest that the Court envisioned circumstances other than legislative denial of rights which would permit removal. If there could be any doubt, it must be regarded as settled by decisions such as *Gibson v. Mississippi*, 162 U. S. 565 (1896), where removal was denied with this language:

> (I)t is clear that the accused in the present case was not entitled to have the case removed . . . unless he was denied, by the constitution or laws of Mississippi, some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that state . . . . (The application for removal is improper) for the reason that neither the constitution of Mississippi nor the statutes of that state prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of the United States . . . .

Gibson v. Mississippi, supra; Neal v. Delaware, 103 U. S. 370 (1881); and *Bush v. Kentucky*, 107 U. S. 110 (1883), all of which contained similar language, were reviewed by the Supreme Court in *Kentucky v. Powers, supra*:

> In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in Section 641 "who is denied or cannot enforce in the judicial tribunals of the state . . . any right secured to him by any law providing for the equal civil rights . . . ." did not give the right of removal, unless the Constitution or the laws of the state in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such state of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of removal under Section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the Constitution or laws of the state, as interpreted by its highest court.

This case, *Kentucky v. Powers*, was the last full scale examination of the removal statute by the Supreme Court, and it has frequently been denominated the leading case on the subject. No case has been found in which the court has suggested that the rule stated in *Powers* should in any way be modified. The lower federal courts, however, have had more recent opportunities to consider the statute and the unanimity with which they have followed the restrictive view announced in *Powers* is significant.

In *State of North Carolina v. Alston*, 227 F. Supp. 887 (M. D. N. C. 1964), two-hundred seventeen Negro and white civil rights workers were charged with one-hundred ninety-two criminal trespass offenses and five-

hundred forty-two other offenses. Petitioning for removal, they alleged that the charges had arisen from their efforts to obtain service in licensed premises of public accommodation (this case was decided prior to the enactment of the Civil Rights Act of 1964); that their presence was objected to solely because of race; that the state courts were inappropriate forums for the redress of their constitutional rights; and that a trial in state court would be a deprivation of the federally guaranteed equal rights. Petitioners argued that the use of state criminal trespass statutes as an aid to the enforcement of private discrimination deprived them of equal rights. Sustaining a motion to remand, the district court said:

> It is well settled that 28 U. S. C. A. § 1443 authorized the removal of a criminal case from a state court to a Federal court "only when the constitution or laws of the state deny or prevent the enforcement of equal rights secured to a party by the constitution or laws of the United States, and not where the equal civil rights of citizens are recognized by the constitution or laws of the state." 76 C. J. S. Removal of Causes § 94. . . . "There is no right of removal under the statute where the alleged denial of, or inability to enforce, any such right results from the corrupt, illegal, or unauthorized administration of a state Constitution or laws which are not discriminatory and apply to all citizens alike." 45 Am Jur Removal of Causes 3109.
>
> . . . .
>
> In summary, since no discriminatory state statutes or constitutional provisions are claimed, it is abun-

dantly clear that petitioners must look to the state courts for the protection of any rights they might have under the Constitution and laws of the United States.

See also, *Steele v. Superior Court of California, supra*; *State of New Jersey v. Weinberger*, 38 F. 2d 298 (D. C. N. J. 1930); *In re Hagewood*, 200 F. Supp. 140 (D. Mich. 1961); *City of Birmingham v. Croskey*, 217 F. Supp. 947 (N. D. Ala. 1963); *State of Arkansas v. Howard*, 218 F. Supp. 626 (E. D. Ark. 1963); *Anderson v. State of Tennessee*, 228 F. Supp. 207 (1963); and *State of Alabama v. Shine*, 233 F. Supp. 371 (M.D. Ala. 1964).

Assuming arguendo the truth of petitioner's assertion that the enacting Congress did not intend this restrictive construction of the statute, and that the courts misconceived the legislative purpose, it seems fruitless to consider this point after nearly a century of judicial construction importing a contrary view. At this date it would appear that nothing short of an act of Congress could reestablish the supposed original intent of that body. The very absence of such new legislation in the face of long continued judicial rejection of that view is perhaps most significant of all in rebutting the proposition that Congress intended the federal courts to assume removal jurisdiction of state criminal prosecutions on petitions alleging that local officials would illegally discriminate in the application of non-discriminatory state laws. The several civil right acts of the last few years, while considering in detail legislative solutions to the problems created by racial prejudice, have made no attempt to redefine the

scope of 28 U. S. C. § 1443. Indeed, the framers of the Civil Rights Act of 1964, Pub. L. 88-352 (1964), had occasion to consider the removal statute in the amendment to 28 U. S. C. § 1447, providing that remand orders under 28 U. S. C. § 1443 should be reviewable on appeal, but in so doing they made no alteration whatsover in the form of the removal statute itself.

Assuming further the truth of petitioner's contention that the Supreme Court in *Virginia v. Rives, supra,* did not make legislative denial of equal rights an inflexible prerequisite to removal but instead required only substantial certainty of such denial, it is clear from the quotations above and cases cited that the decision was not so regarded by subsequent courts. It also appears that the courts have had difficulty imagining circumstances short of legislative denial of rights which would attain that degree of certainty justifying removal, since no case has been brought to this court's attention where such circumstances have been judicially approved even in hypothesis.

Examination of the petition here compels the conclusion that it does not sufficiently state grounds for removal under 28 U. S. C. § 1443 (1). Even if the Petitioners' arrest was carried out as a harassing tactic in furtherance of a policy of discrimination, that fact does not entitle petitioner to remove because such practices are not only not required by state law but indeed would be gross violations of that law. The evil complained of (if it actually exists) amounts to "criminal misuse of state law" by public officials which is not such a denial or disability

to enforce in the state courts petitioner's equal civil rights as would support removal. Her remedy is in the state courts. *Virginia v. Rives, supra.*

The ordinance[2] upon which petitioner's prosecution rests is not discriminatory so as to support removal. It is readily apparent that this ordinance does not discriminate against petitioner, any class of which she is a member, or any class at all. The restrictions on various types of recording and transmission activities are made applicable to "any person, or persons." Clearly no violation of the equal protection clause of the Fourteenth Amendment appears on the face of the ordinance.

The existence of public hostility to petitioner which will deprive her of a fair trial is not required by a state constitutional provision or statute. In fact, state law provides for change of venue in criminal cases to eliminate that element. Local prejudice against a defendant in the state courts is not an adequate ground for removal. *Rand v. Arkansas*, 191 F. Supp. 20 (W. D. Ark. 1961). Inability

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[2] Section 14-8.1, Code of Ordinances of the City of Clarksdale, Mississippi.

(a) It shall be unlawful for any person, or persons, to make voice or other sound recordings or transmissions of voice or other sounds by radio, or other sound media, or to take photographs, still pictures, motion pictures or television pictures within any building belonging to the City of Clarksdale, Mississippi, or any other property belonging to said City, without the prior permission of the board of mayor and commissioners of the City of Clarksdale, Mississippi.

(b) Any persons violating any of the provisions of this section shall be guilty of a misdemeanor and be punishable by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the City of Clarksdale, Mississippi jail for not more than thirty (30) days, or by both such fine and imprisonment.

to retain local counsel because of such local hostility is again not a deprivation of right traceable to the constitution or laws of Mississippi. It may be noted that the duties of Mississippi attorneys include the following:

> It is the duty of attorneys:
>
> . . . .
>
> (7) Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed. Mississippi Code Ann. 1942 (Recompiled) § 8665.

It is not alleged that the practice of segregated seating in state courtrooms is maintained under provisions of the state constitution or statutes or other regulatory provision, and this ground is thus insufficient. For the same reasons, the alleged practice of improperly addressing Negro witnesses and attorneys in the state courts does not entitle petitioner to bring her case to the federal courts.

The exclusion of Negroes from the elections at which state judges are elected is not ground for removal since there are no state laws which limit the right of Negroes to vote in Mississippi because of their race. *City of Birmingham v. Croskey, supra.* For identical reasons, alleged systematic exclusion of Negroes from service on state juries is insufficient. *Gibson v. Mississippi, supra;* and the requirement of excessive bond in civil rights cases, which is not permitted by state law, does not serve to bring the case to this court.

In summary, the existence of these illegalities, even if true, is neither required, permitted or condoned by the

laws of Mississippi and under the settled law it would be improper for this court to find that petitioner will be denied or unable to enforce in the courts of the state her equal civil rights as a United States citizen. Insofar as it depends upon 28 U. S. C. § 1443 (1), the removal was improvident and this court is without jurisdiction.

II.

The petition also alleges that petitioner is being prosecuted for acts done under color of authority derived from laws providing for equal rights, and thus that she is entitled to remove under 28 U. S. C. § 1443 (2).

Petitioner invokes all statutory and constitutional provisions which can be said to provide for equal rights, but she lays emphasis in her brief on 42 U. S. C. § § 1981, 1983 and 1985. It is contended that these statutes create or protect certain equal civil rights; that while engaged in the campaign for the promotion of the equal civil rights of Negroes in Mississippi, she was herself exercising rights which are protected by those statutes; that both her general activities in that campaign and the specific act for which she was arrested were acts under the color of authority of laws providing for equal rights; and that she is being prosecuted "because of her activities as a COFO worker. These activities have subjected her to the hostility of state and local government officials and law enforcement authorities and have resulted in a denial of her right to conduct herself peaceably and quietly on public property." In short, she contends that she was exercising rights under the various civil rights statutes, thereby incurring the hostility of state and local officials,

so that such officials were motivated to prosecute her for those acts and that "Congress has authorized removal to the federal courts of any state prosecution brought against individuals for the exercise of rights under the various civil rights acts."

The specific issue here is whether petitioner has alleged facts from which it can be said that she is being prosecuted for acts done under color of authority derived from any law providing for equal civil rights, within the meaning of 28 U. S. C. § 1443 (2). "Color of authority" is a phrase of art in the law. It is defined in 15 C. J. S., Color, p. 235, as follows:

> *Color of authority.* Authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer.

From this accepted meaning of this phrase, removal is not available under subsection (2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Neither the constitution nor the statutes cited by petitioner purport to grant her any authority to act in any official capacity so as to entitle her to remove a state prosecution instituted because of such acts. The mere exercise of rights created or protected by federal civil rights statutes does not spread a cloak of immunity from state prosecution over persons who, by the acts involved in such exercise of their equal civil rights, also violate state law.

The almost total absence of judicial interpretation of subsection (2) lends credence to this view. During its

century of existence, subsection (2) and its predecessors have not been regarded by the bench and bar as authorizing removal in the circumstances here. This inference is compelled when consideration is given to the fact that in most, if not all, of the removal cases cited earlier in this opinion, the petitioner there had equally as good grounds as petitioner here to invoke subsection (2), if petitioner's view of the statute is valid. Yet, the point was never raised until recently. Obviously, the legal profession has regarded subsection (2) as being unavailable to private individuals who are being prosecuted for acts which are claimed to amount to exercise of their federal equal civil rights.

The difficulty with petitioner's construction of the statute is that it proves too much. Adoption of petitioner's view would so extend the operation of subsection (2) that it would eliminate, as a practical matter, the functions of the state courts. For example, the first statute cited by petitioner, 42 U. S. C. § 1981, reads as follows:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

It must be noted first that the guilt or innocence of the petitioner is immaterial. That issue would not be open for consideration until it had first been determined that this court had jurisdiction. With this in mind, it must be

observed that § 1981 grants to all persons within the jurisdiction of the United States a guaranty of equal protection of the law. In effect, it is the implementing statute of the equal protection clause of the Fourteenth Amendment. Under petitioner's view, any person who exercised a right so protected, and for such exercise was prosecuted in the state court, would be entitled to remove under subsection (2). Thus, the "laws and proceedings for the security of persons" to which all persons shall have the same right generally include the right to use necessary force in self defense when attacked. If the mere exercise of such a right entitles one to removal of a state prosecution brought because of that act, then any person charged with assault and battery who relied on self defense as a defense would be entitled to remove, regardless of his guilt or innocence.

Such a construction seems absurd. Perhaps petitioner would modify it by reading in limitations to prevent the extreme application illustrated. Such limitations might include the existence of local prejudice against the petitioner, proof of discriminatory practices of local authorities against the class of which petitioner is a member, the character of the activity in which petitioner was engaged when the alleged crime was committed, or even the motivation of the prosecutor in bringing the action. Insofar as such modifications suggest that removal would be available to only a particular class of state criminal defendants, possible issues of constitutional propriety are raised. It is enough to say, however, that such modifications are so speculative with respect to the probable intent of Congress that they should issue from that branch of the government rather than this.

This court is of the opinion that Congress did not intend such a strained, impractical construction of the statute, but rather intended to follow the accepted use of the phrase, "color of authority", granting the right of removal to persons acting in an official or quasi-official capacity.

Since it is apparent that petitioner was acting only as a private individual, the removal of her prosecution from the Police Court of the City of Clarksdale to this court on the basis of subsection (2) was also improvident and this court is without jurisdiction.

It follows that the motion to remand is well taken and will be sustained.

An order will be entered in accordance with this opinion to remand this case to the court from which it was improperly removed.

This the .... day of December, 1964.

CLAUDE F. CLAYTON
District Judge

APPENDIX G.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21655

WILLIE PEACOCK, ET AL,
Appellants,

versus

THE CITY OF GREENWOOD, MISSISSIPPI,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(June 22, 1965.)

Before WOODBURY,* WISDOM, and BELL, Circuit Judges.

BELL, Circuit Judge: This cause arises under the removal statute, 28 USCA, § 1443. The appeal is from an order of the District Court sustaining the city's motion to remand fourteen criminal cases to the city police court.

The petitions for removal alleged that appellants were arrested in Greenwood, Mississippi, and charged with obstructing public streets in violation of § 2296.5, Mississippi

* Of the First Circuit, sitting by designation.

Code of 1942.[1] Removal jurisdiction was predicated on both paragraphs (1) and (2) of § 1443.[2] It was alleged that appellants were members of the Student Non-Violent Coordinating Committee, an organization affiliated with the Conference of Federated Organizations, both civil rights groups; and that at the time of the arrests, they were engaged in a voter registration drive assisting Negroes to register and secure the right to vote as guaranteed by the Federal Constitution, and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Appellants further alleged that the Mississippi statute in question was vague, indefinite, and unconstitutional, both on its face and as applied, and that their arrests and trial under it would prevent them from exercising their First and Fourteenth Amendment rights to free speech, assembly, and petition.

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[1] In pertinent part:

"1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment." Miss. Laws, 1960, Ch.244.

[2] "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

Finally, it was said that appellants were being denied equal protection of the laws and that the statute was being enforced against them as part and parcel of a policy of racial segregation maintained by the State of Mississippi and the City of Greenwood.

Upon motion by the city of Greenwood, the District Court remanded each case on the ground that § 1443 afforded no jurisdictional basis for removal. With respect to jurisdiction claimed under paragraph (1) of § 1443, the District Court proceeded on the theory that the Supreme Court in several cases[3] ending with *Kentucky v. Powers*, 1906, 201 U.S. 1; 50 L.Ed. 633, restricted that paragraph to situations where the state constitution or statutes, as distinguished from corrupt and illegal acts of state officials, denied or prevented enforcement of the equal rights of the accused. In effect, these decisions of the Supreme Court were construed as limiting § 1443(1) to cases where the denial or inability to enforce equal rights appeared on the face of the state constitution or statutes, rather than in their application.

Following the decision of the District Court,[4] we decided *Rachel v. State of Georgia*, 5 Cir., 1965, ... F.2d ...., slip opinion dated March 5, 1965. The *Rachel* case disposes of the two questions under § 1443(1) raised by

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[3] *Strauder v. West Virginia*, 1879, 100 U.S. 303, 25 L.Ed. 664; *Virginia v. Rives*, 1870, 100 U.S. 313, 25 L.Ed. 667; *Neal v. Delaware*, 1881, 103 U.S. 370, 26 L.Ed. 567; *Bush v. Kentucky*, 1883, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354; *Gibson v. Mississippi*, 1896, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.

[4] See also *City of Clarksdale v. Gertge*, N.D.Miss., 1964, 237 F.Supp. 213, now pending on appeal in this court as case No. 22,323.

this appeal: (1) whether the brief allegations of the removal petitions were sufficient as a matter of pleading to allege a cause for removal under § 1443(1); and (2) whether § 1443(1) allows removal where a state statute, though valid and non-discriminatory on its face, is applied in violation of some equal right of the accused.[8] The additional question presented by this appeal is whether paragraph (2) of § 1443 also affords a basis for removal under the facts of this case.

I.

From the *Rachel* decision and its application of the rules of federal notice type pleading to removal petitions, it is plain that the petitions here are adequate as a matter of pleading to set forth the contention that Mississippi Code § 2296.5 is being applied so as to deny appellants their rights under the equal protection clause of the Fourteenth Amendment. Appellants allege that they are being prosecuted for obstructing public streets in violation of Mississippi Code § 2296.5, that they are being denied equal protection of the law, and that the Mississippi statute in this instance is being enforced as part of a policy of racial

[8] The District Court did not reach the question of whether the statute was unconstitutional by reason of being vague and indefinite. Neither do we for it goes without saying that prosecution under such a statute, standing alone and without discriminatory overtones, would not show a denial or inability to enforce equal civil rights within the terms of either paragraph of § 1443.

The criticism by the District Court based on verification of the petitions by counsel instead of petitioners, and of the failure to file state court pleadings, process and orders in the federal court are not regarded as questions presented since these criticisms were no part of the basis for remand.

segregation maintained by the state and city. It is a fair inference that they contend that the statute is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote. It may be on remand that proof of these allegations will be insufficient. However, if these allegations are true, a denial of equal protection of the law would be established.

Under the precedent of *Rachel* and the authorities therein cited having to do with notice type pleading, we hold that the removal petitions are adequate at this stage of the proceeding to set forth a claim for removal based on the proposition that appellants are denied or cannot enforce in the courts of Mississippi their rights under the equal protection clause of the Fourteenth Amendment by virtue of the discriminatory application of Mississippi Code § 2296.5. We proceed therefore to consider whether such a claim for removal is included within the scope of § 1443(1).

II.

It is settled that the equal protection clause of the Fourteenth Amendment constitutes a "law providing for the equal civil rights of citizens of the United States" within the meaning of § 1443(1). *Strauder v. West Virginia*, 1879, 100 U.S. 303, 26 L.Ed. 664 (by implication); *Steele v. Superior Court*, 9 Cir., 1948, 164 F.2d 781.

The court in *Steele* suggested, and it is our view, that not every violation of the equal protection clause will

justify removal, but only those violations involving discrimination based on race. This limitation comports with the historic purpose of § 1443. Appellants also allege deprivation of rights under the due process clause of the Fourteenth Amendment and under the First Amendment as incorporated therein. We hold, however, that the due process clause is not a law providing for *equal* rights within the contemplation of the removal statute. This view accords with the holding in *Steele* and in *New York v. Galamison*, 2 Cir., 1964, ... F.2d ...., cert. den., ... U.S. ...., where the court said:

> "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all."

The removal statute contemplates those cases that go beyond a mere claim of due process violation; they must focus on racial discrimination in the context of denial of equal protection of the laws. The allegation of appellants that the Mississippi statute is being employed to thwart their efforts to assist Negroes to register to vote is sufficient to meet this test. It is a claimed denial of an equal civil right based on race.

The difficult question is whether removal jurisdiction under § 1443(1) is limited to situations where the denial

of inability to enforce rights under the equal protection clause appears from the face of the state constitution or statutes, or whether that section also encompasses cases where the deprivation of equal rights arises from the application of an otherwise valid statute. On this question also, however, we feel that the City of Greenwood is foreclosed by the reach of *Rachel v. State of Georgia supra*.

Rachel involved prosecutions of sit-in demonstrators under the Georgia anti-trespass statute, Ga. Code § 26-3005. The Georgia statute, like the Mississippi statute here, was non-discriminatory on its face, and only through application could it operate to deny equal civil rights. The law providing for equal civil rights was the Civil Rights Act of 1964, as construed by the Supreme Court in *Hamm v. City of Little Rock*, 1964, ... U.S. ..., ... S.Ct. ..., 13 L.Ed.2d 300, to retroactively bar state prosecutions for peaceful sit-in demonstrations. The removal petitions in that case were construed as alleging, in effect, that Ga. Code § 26-3005 was being applied to appellants in violation of the Civil Rights Act of 1964 (and therefore in violation of the Supremacy Clause). We held that as thus construed the removal petitions stated a good claim for removal under § 1443(1). It was as if the Civil Rights Act had placed a gloss on the Georgia statute to the effect that it was not to be applied in peaceful sit-in demonstrations.

Thus, *Rachel* allowed removal based on the alleged application of a state statute contrary to an Act of Congress, while the instant case involves the alleged application of a state statute contrary to the equal protection clause. The rationale of *Rachel* is inescapably applicable here,

since both cases involve the denial of equal rights through statutory application, rather than through some infirmity appearing on the face of the state statute.

The City of Greenwood relies on the series of Supreme Court cases ending with *Kentucky v. Powers, supra,* in support of its contention that removal will not lie unless the deprivation of equal rights stems from the face of state legislation. See cases cited note 3, *supra.* The District Court took this view in ordering the cases remanded. The question is not without difficulty but we are constrained to a broader reading of these decisions.

The Supreme Court first had occasion to delineate the scope of § 1443(1) in *Strauder v. West Virginia* and *Virginia v. Rives,* decided the same day. In *Strauder,* a West Virginia statute limited jury service to "white male persons," and a Negro charged with murder sought removal on the grounds that this statute denied him in the courts of West Virginia his rights under the equal protection clause. The court held that a good claim for removal under the predecessor of § 1443(1) had been stated. In *Virginia v. Rives,* although the Virginia statute was nondiscriminatory, the allegation was that state officials excluded Negroes when selecting juries. Here removal was disallowed. The court emphasized that the denial of equal rights must appear in advance of trial. In view of this requirement, the court stated that § 1443(1) was limited "primarily, if not exclusively" to denial of rights "resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case." As for administrative deprivations of protected rights by state

officials acting in violation of state law, "it ought to be presumed the [state] court will redress the wrong." The remaining cases relied on—*Neal v. Delaware*, *Bush v. Kentucky*, *Gibson v. Mississippi*, and *Kentucky v. Powers*—all involved administrative exclusion of Negroes from juries, and all hold in accordance with *Virginia v. Rives* that § 1443(1) affords no basis for removal under such circumstances.

In our view, these cases establish only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitution provisions. The stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial. However, this reasoning gives way to the fact that the illegality of a grand jury indictment springing from systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute. In short, we do not read these cases as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism

may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process.

Thus, we find nothing in the prior decisions of the Supreme Court, nor in the language of § 1443 itself, to require limitation of that section to cases involving laws violative of equal rights on their face. We therefore hold that a good claim for removal under § 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination.

Of course, such allegations must be proved if they are challenged. Consequently, removal based on the misapplication of a statute may fail for want of proof. However, we deal here only with what allegations are sufficient to prevent remand without a hearing. Appellants allege that Mississippi Code § 2296.5 is being applied against them for purposes of harassment, intimidation, and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the laws. We simply hold that these allegations entitle appellants to remove their cases to the federal court.[6] It follows that

[6] Proof of the allegations in this case would establish removal jurisdiction and *ipso facto* entitle appellants to dismissal of their prosecutions by the District Court. Failure of proof would require remand to the state court for trial.

the District Court erred in remanding these cases to the state court without a hearing, and we reverse and remand for a hearing on the truth of appellants' allegations.

III.

Appellants also sought removal under paragraph (2) of § 1443 on the ground that they were being prosecuted for acts done under color of authority derived from federal laws providing for equal rights. They alleged, as previously stated, that at the time of their arrests, they were engaged in a voter registration drive assisting Negroes to secure the right to vote as guaranteed by the Constitution and the Civil Rights Act of 1960, 42 USCA, § 1971 et seq. Again applying the philosophy of notice type pleading to the removal petitions, we construe them as alleging that appellants are being prosecuted for acts committed under color of authority of the equal protection clause and 42 USCA, § 1971. There is a complete absence of any allegation that appellants were acting in an official or quasi-official capacity. In essence, it is appellants' position that paragraph (2) of § 1443 authorizes removal by any person who is prosecuted for an act committed while exercising an equal civil right under the Constitution or laws of the United States. We cannot agree.

The Second Circuit recently had occasion to rule on the meaning of § 1443(2) in *New York v. Galamison*, Jan. 26, 1965, ... F.2d ...., cert. den., ... U.S. ..... There, removal was sought by civil rights demonstrators who were being prosecuted for various acts which had disrupted traffic to the New York World's Fair. The court affirmed

the District Court's order of remand. The demonstrators contended that they were being prosecuted for acts committed under color of authority of the equal protection clause, and 42 USCA, § 1981. The court, in an opinion by Judge Friendly, held that neither the equal protection clause nor § 1981 confers color of authority to perform the acts which the state alleged to be in violation of its laws of general application. The court stated:

> "When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."

The Second Circuit expressly refrained from deciding whether § 1443(2) is limited to officers or persons acting in some way on behalf of government.

In *City of Clarksdale v. Gertge*, N.D. Miss., 1964, 237 F. Supp. 213, Judge Clayton reached the question pretermitted in *Galamison*, holding that from the generally accepted meaning of the phrase "color of authority," removal is not available under § 1443(2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. This rationale was also the basic for the District Court's remand order in the present case. We agree with this construction.

Paragraph (2) of § 1443 had its genesis in the Civil Rights Act of 1866, 14 Stat. 27, where the operative language allowed removal of suits and prosecutions "against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . ." or the Freedmen's Bureau legislation.[7] This language survived in substance until the 1948 revision when the statute was recast in its present form, with all reference to the categories of persons being deleted. The 1948 reviser's note disclaimed any intention to change the substance of the section,[8] and in view of this, we feel that the more expansive language contained in the earlier enactments furnishes an appropriate guide to the true meaning of the section. *Cf. Madruga v. Superior Court,*

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[7] The first sentence of § 3 reads as follows:

"*And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . . ."

[8] See H. R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947).

1954, 346 U.S. 556, 560 & n. 12, 74 S.Ct. 298, 98 L.Ed. 290, 296.

Section 3 of the Civil Rights Act of 1866, the removal section, must be viewed in the context of the Act as a whole. Section 1, now 42 USCA, § 1981, declared Negroes to be citizens, conferred upon them various juridical rights of citizenship, such as the ability to make and enforce contracts, and guaranteed them the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to no other . . ." Section 2 made it a crime to deprive persons of rights secured by the Act. Next followed the removal provision, now 28 USCA, § 1443. Sections 4-10 of the Act were devoted to compelling and facilitating the arrest and prosecution of violators of § 2. These sections, *inter alia*, authorized federal commissioners to appoint "suitable persons" to serve warrants, and allowed the persons so appointed to "summon or call to their aid the bystanders or posse comitatus of the proper county . . . ."

When § 1443(2) is viewed in this perspective, it is plain that Congress was primarily concerned with protecting federal officers engaged in enforcement activity under the 1866 Act and the Freedmen's Bureau Legislation. The use of the more inclusive "officer . . . or other person" language is explained by the need to protect by-standers, members of the posse comitatus and other quasi-officials as well. Moreover, the language "for any arrest or imprisonment, trespasses or wrongs . . . committed . . . under color of authority derived from this act" strongly suggests enforcement activity. Had Congress intended to allow removal by someone merely exercising an equal civil

right, as appellants contend, it would have been quite simple to use the term "any person," as indeed was used in § 1443(1), rather than the limited "officer . . .. or other person."

Thus, we feel that the original language and context of § 1443(2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity. This conclusion is buttressed by the fact that appellants' construction of paragraph (2) would bring within its sweep virtually all the cases covered by paragraph (1), thereby rendering that paragraph of no purpose or effect. Paragraph (1) requires a denial or the inability to enforce equal rights in the state court. If paragraph (2) covers all who act under laws providing for equal rights, as appellants contend, this requirement could be avoided simply by invoking removal under the second paragraph. Paragraph (1) is an adequate vehicle for the protection and vindication of the rights of appellants, and we find no warrant for giving paragraph (2) the strained and expansive construction here urged.

We therefore hold that the portion of the judgment of the District Court which denied removal based on § 1443 (2) was correct. However, the court erred in holding that the allegations of the petitions did not state a good claim for removal under § 1443(1), and this part of the judgment must be reversed and the case remanded to the District Court for a hearing on the truth of these allegations.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings not inconsistent herewith.

APPENDIX H.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22597.

DOROTHY WEATHERS, ET AL.,
Appellants,

versus

CITY OF GREENWOOD, MISSISSIPPI,
Appellee.

ON MOTION TO DISMISS APPEAL AND FOR SUMMARY REVERSAL

Before HUTCHESON, RIVES and BELL, Circuit Judges.

PER CURIAM: The motion of appellee to dismiss the appeal is DENIED.

On the motion of the appellants for summary reversal, it appears that the issues determined in Fifth Circuit No. 21655, *Willie Peacock, et al. v. The City of Greenwood, Mississippi*, decided June 22, 1965, are identical with the issues on this appeal. It follows from the decision in *Peacock* that the district court erred in remanding these cases to the State court without a hearing. The orders of remand are therefore vacated and the case is remanded for a hearing on the truth of the appellants' allegations.

VACATED AND REMANDED.

APPENDIX I.

MISSISSIPPI CODE OF 1942, RECOMPILED:

SECTION 2089.5 DISTURBANCE OF THE PUBLIC PEACE, OR THE PEACE OF OTHERS.

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine or not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

SECTION 2291. OBSCENITY—PROFANITY AND DRUNKENNESS.

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two or more persons, he shall,

on conviction thereof, be fined not more than one hundred dollars.

SECTION 2296.5. OBSTRUCTING PUBLIC STREETS, ETC.—WILFUL OBSTRUCTION OF, OR INTERFERENCE WITH, USE OR PASSAGE.

1. It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SECTION 7185-13. CONTRIBUTING TO THE NEGLECT OR DELINQUENCY OF A CHILD MADE A MISDEMEANOR.—Any parent, guardian or any other person who wilfully commits any act or omits the performance

of any duty which act or omission contributes to or tends to contribute to the neglect or delinquency of a child as defined in this act, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency, or institution to which such child shall have been committed by the court, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed $500.00, or by imprisonment not to exceed six months in jail, or by both such fine and imprisonment. Nothing contained in this section shall prevent proceedings against such parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor; provided that nothing in the provisions of this act shall preclude a father, mother or guardian of any child from having a right to trial by jury when charged with having violated the provisions of this section.

SECTION 8576. NATIONAL GUARD—HOW ORDERED OUT.

When the state is threatened with invasion, insurrection, flood, or other catastrophe, or when there exists a riot, mob, unlawful assembly, breach of the peace or resistance to the execution of the laws of the state, or imminent danger thereof, and if in the opinion of the governor, the civil authorities are unable to repel or suppress the same, or if the sheriff or judge or the circuit court of any county,

call upon the governor for the aid of the troops, it shall be the duty of the governor to order out the Mississippi National Guard, or such part thereof as he may deem necessary for the purpose. Provided, that if the troops be ordered into any county in the aid of civil authorities at the request of the sheriff or the judge of the circuit court of said county, the governor shall be the sole judge of the number of troops to be ordered out on such service, and that the cost of such service shall be borne by the state.

Whenever any part of the military forces of this state is on active duty pursuant to the order of the governor, the commanding officer may order the closing of any place where intoxicating liquors, arms, ammunition, dynamite or other explosives are sold, and forbid the sale, barter, loan, or the giving away of any of these articles so long as any of the troops remain on duty in the vicinity where the place ordered closed may be located.

Before using military force in the dispersion of any riot, rout, tumult, mob or other lawless or unlawful assembly, or combination mentioned in this chapter, it shall be the duty of the civil officer calling out such military force, or some other conservator of the peace, or if none be present, then of the officer in command of the troops, or some person by him deputed to command the persons composing such riotous, tumultous, or unlawful assemblage or mob, to disperse and retire peacefully to their respective abodes and businesses; but, in no case, shall it be necessary to use any set or particular form or words in ordering the dispersion of any riotous, tumultous or unlawful assembly; nor shall any such command be neces-

sary where the officer or person, in order to give it, would necessarily be put in imminent danger of loss of life, or great bodily harm, or where such unlawful assembly or riot is engaged in the commission or perpetration of any forcible and atrocious felony, or in assaulting or attacking any civil officer, or person lawfully called to aid in the preservation of the peace, or is otherwise engaged in the actual violence to any person or property.

Any person, or persons, composing or taking part in any riot, rout, tumult, mob or lawless combination or assembly, mentioned in this chapter, who, after being duly commanded to disperse as hereinbefore provided in this section, wilfully and intentionally fail to do so, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one, nor more than two, years.

Any person who unlawfully assaults or fires at, or throws any missile at, against, or upon any member or body of the militia or national guard, or civil officer, or other person lawfully aiding them, when assembling or assembled for the purpose of performing any duty under the provision of this section, must, on conviction, be imprisoned in the penitentiary for not less than two years, nor more than five years.

If any portion of the militia or national guard, or person lawfully aiding them in the performance of any duty under the provisions of this section, are assaulted, attacked, or are in imminent danger thereof, the commanding officer of such militia or national guard need not await any orders from any civil magistrate, but may at once

proceed to quell such attack, and take all other needful steps for the safety of his command.

Whenever any shot is fired, or missile thrown, at or upon any body of the national guard or militia, in the performance of any duty under the provisions of this section it shall forthwith be the duty of every person in the assemblage from which the shot is fired, or missile thrown, immediately to disperse or retire therefrom, without awaiting any orders to do so; and any person knowing or having reason to believe that a shot has been fired, or missile thrown, from any assemblage of which such person forms a part, or where he is present, and failing, without lawful excuse to retire immediately from such assemblage, is guilty of a misdemeanor, and must on conviction be imprisoned in the county jail for not less than one month, nor more than one year, and any person so remaining in such assemblage after being duly commanded to disperse, is guilty of a felony, and must on conviction be imprisoned in the penitentiary for not less than one year, nor more than two years.

SECTION 9352-21. PENALTY FOR FALSE STATEMENT.—All applications for privilege licenses required under the provisions of this act shall be made in writing, and any person who shall wilfully and knowingly make any false statement or representation in such application shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or not more than the sum of one hundred dollars ($100.00) or by imprisonment in the county jail, or by both such fine and imprisonment, in the discretion of the court.

SECTION 9352-24. VEHICLE DEALERS—ENFORCEMENT OF ACT—DISPOSITION OF ASSESSED PENALTIES.

1. (a) Every dealer in or agent for vehicles, except motorcycles, as herein defined, shall, on or before November first of each year, or before commencing business, make an application to the Motor Vehicle Comptroller of the State of Mississippi for a dealer's permit, on forms prescribed and furnished by the motor vehicle comptroller, which forms shall include a statement that the dealer and/or agent for vehicles is actively engaged, or will be actively engaged, in selling vehicles to the public at the time the application is made, or immediately thereafter, and such application shall show his sales tax account number, and such other information as may be required upon the forms prescribed by the motor vehicle comptroller. The motor vehicle comptroller shall prescribe such forms as will enable him to determine whether, in fact, the applicant is a bona fide dealer in, or agent for, vehicles and make every reasonable effort to limit the issuance of dealer's tags to those actively engaged in the business.

The annual highway privilege tax for each dealer's license tag shall be fourteen dollars ($14.00), plus a registration or tag fee, and such tax shall be paid on or before the first day of November of each year except in the case of commencement of business after the first day of November, in which event application shall be made and the tax paid prior to the commencement of such business. The tax imposed by this section shall be prorated semi-

annually and dealers commencing business between November first and May first of the following years shall be required to pay the full annual tax, and dealers commencing business after the first day of May of any year shall be required to pay one half (½) of the annual tax for the remainder of the year ending October thirty-first. The payment of the annual tax of fourteen ($14.00) and the license tag fee shall entitle the dealer to the issuance of one license tag for use as herein provided, and such dealer shall be entitled to obtain additional license tags, not to exceed twelve (12) during any one year. However, upon good cause therefor being shown, the comptroller may, at his discretion, authorize and permit any dealer to purchase and obtain a greater number of additional tags than twelve (12) when same is necessary for proper conduct of dealer's business. For each such additional license tag, there shall be paid a tax of fifty ($50.00) plus the registration or tag fee and the tax for such additional tag shall be prorated as provided above. Every dealer in, or agent for, motorcycles exclusively shall make application for and obtain the dealer's license tag and permit as above provided, except that the annual tax on such a dealer shall be six dollars ($6.00) per year for each tag, plus the registration or tag fee. All other provisions of this section, including the provisions for additional tags, shall apply to such motorcycle dealers.

Dealer's license tags shall be fastened to and displayed only upon such vehicles as are actually being demonstrated for purposes of sale; for delivery of vehicles, by driveout method from factory, assembly plant or place of business to customer or other places of business of the

dealer; and for the movement of vehicles from point to point when the vehicle is the property of the dealer as such. Provided that the privilege granted shall not be construed to mean that any dealer may use dealer's tags except for personal use or for hauling or transporting property or persons except in bona fide demonstrations.

If any dealer shall fail or refuse to pay the tax levied herein on or before the date on which the vehicle is operated on the streets or highways of this state, then such person shall be liable for the full amount of such tax plus a penalty thereon of one hundred per cent (100%).

(b) Every said dealer or agent shall make a monthly report to the comptroller on or before the twentieth day of each month, on all motor vehicles and/or trailers, whether new or used, coming into his possession during the previous month, and from whom obtained, showing name and post-office address. The report shall also show all motor vehicles and/or trailers sold by him during the month, to whom sold, and the name and address of the purchaser. The report shall further show all motor vehicles and trailers permanently dismantled by him, with the tag and motor number of same, together with those on hand on the last day of the month, giving description as herein provided.

In giving descriptions of the motor vehicles and/or trailers as herein required, the dealer or agent shall give the name, type, motor number and serial number of the passenger car; and, in addition, the tonnage of trucks and trailers, or truck-semitrailer units, and such other infor-

mation as may be required by the comptroller, on forms prepared by said comptroller.

Dealer's tags shall only be used on vehicles owned by a dealer as such and for the purposes authorized by this section. As soon as a dealer shall sell or transfer a vehicle or motorcycle, he shall immediately remove therefrom the dealer's tag and the purchaser or transferee shall immediately comply with the provisions of the law with reference to obtaining license tags. Any person owning a vehicle or motorcycle bearing a dealer's tag when such person is not a dealer or when a dealer uses a dealer's tag for any purpose other than that authorized by this section then such person or dealer shall be deemed to be operating the vehicle in violation of the provisions of this act and shall be required to immediately obtain proper license and shall pay for such tag the full annual privilege license tax applicable, plus a penalty of one hundred per cent (100%).

If any person, firm, or corporation claiming to be a dealer, or any person acting for either of them, shall make any false answer to any part of the application required by this act, then the dealer shall forfeit his right to use dealers' tags.

Whenever a vehicle is found to be improperly operated with a dealer's tag, such dealer's tag shall be forfeited. If any dealer shall fail or refuse to file reports as required by this section for a period of sixty (60) days after such report is due, his dealer's tags shall be taken up and his permit shall be suspended until all such reports, then

in arrears, are filed. For the second failure to file reports for a sixty-day period, the dealer's permit shall be revoked for the remainder of the current tag year but no part of the permit or tag fees shall be refunded.

All moneys collected by the motor vehicle comptroller as proceeds from the tax imposed by this act shall be distributed to the various counties of the state according to the provisions of section 64, chapter 266, laws of 1946, appearing as section 9352-64, Mississippi Code of 1942, Recompiled.

2. The motor vehicle comptroller, the commissioner of public safety, all sheriffs and tax collectors, county patrolmen and authorized municipal officers are hereby authorized and directed to enforce the provisions of this act. Any penalties assessed at the instance of any municipal officials shall be divided fifty per cent (50%) to the municipality which initiated the penalty and fifty per cent (50%) to the county in which such municipality is located. Sheriffs and tax collectors shall be entitled to their share of penalties as is elsewhere provided by law. Any penalties imposed at the instance of the officers of the commissioner of public safety, or the motor vehicle comptroller, shall be paid into the county where the violator was apprehended. Any violation of this act shall be promptly reported to the chairman of the state tax commission, and he shall then determine and assess any sales or use taxes found to be due and cause said vehicle to placed upon the assessment rolls for ad valorem taxes.

AN ORDINANCE AMENDING THE TRAFFIC ORDINANCE OF THE CITY OF GREENWOOD ADOPTED NOVEMBER 20, 1953, RECORDED IN BOOK 39 AT PAGE 554 ET SEQ., OF THE MUNICIPAL MINUTES OF SAID CITY AND IN ORDINANCE RECORD 7 AT PAGES 257 ET SEQ., OF THE ORDINANCE BOOK OF SAID CITY BY AMENDING SECTION 76 OF ARTICLE IX THEREOF SO AS TO SET FORTH THE PURPOSES FOR WHICH STREETS AND SIDEWALKS ARE MAINTAINED BY THE CITY AND TO MAKE IT UNLAWFUL FOR ANY PERSON OR PERSONS WITH CERTAIN EXCEPTIONS TO PARADE OR MARCH OR TO S[illegible] KNEEL, OR RECLINE, OR TO ENGAGE IN PUBL[illegible] SPEAKING, GROUP SHOUTING OR GROUP SINGING OR TO ASSEMBLE IN ORGANIZED GROUPS CARRYING SIGNS, ON THE SIDEWALKS OR STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, OR TO INTERFERE WITH THE NORMAL USE OF SIDEWALKS AND STREETS, WITHOUT WRITTEN PERMISSION OF THE CHIEF OF POLICE OF SAID CITY AND TO MAKE IT UNLAWFUL TO PLACE DEBRIS ON STREETS AND SIDEWALKS: AND PROVIDING THAT THIS ORDINANCE BE EFFECTIVE ON THE DATE OF ITS PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF GREENWOOD, LEFLORE COUNTY, MISSISSIPPI:

SECTION 1. That Section 76 of Article IX of the Ordinance styled "AN ORDINANCE REGULATING TRAFFIC UPON THE PUBLIC STREETS OF THE CITY OF GREENWOOD, MISSISSIPPI, AND REPEALING ALL

OTHER ORDINANCES AND SECTIONS OF ORDINANCES IN CONFLICT HEREWITH" adopted November 20, 1953, and recorded in Book 39 at pages 554 et seq., of the Minutes of the Council of the City of Greenwood, Mississippi, and in Ordinance Record 7 at pages 257 et seq., of the Ordinance Book of said City, be and the same is hereby amended so as to be read as follows:

SEC. 76-A. PURPOSE OF STREETS AND SIDEWALKS.

The City of Greenwood, Mississippi, built and maintains its streets and sidewalks for the purpose of affording pedestrians comfortable, safe and convenient means of going from place to place in said City for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Said City built and maintains the vehicular portions of its streets for the additional purpose of affording the public in general comfortable, safe and convenient means for transporting persons and property from place to place in said City, principally by vehicles, for the purpose of carrying out the normal, customary and usual pursuits of everyday life. Use of said sidewalks and streets by any person or persons for purposes other than those above set out interferes with the right of the public in general to use said sidewalks and streets for the purpose for which they were built and are maintained, and is therefore contrary to public convenience, is conducive to public disorder, is dangerous to public safety, and is calculated to cause breaches of the peace. Therefore, the provisions of this ordinance relative to the use of the sidewalks and streets in said City shall be construed most strongly against the person violating the same.

SEC. 76-B. CERTAIN USES OF STREETS AND SIDEWALKS ARE UNLAWFUL.

It shall be unlawful for any person or persons without the written permission of the Chief of Police of the City of Greenwood, Mississippi, to conduct or participate in any parade or marching on the sidewalks or streets of the City of Greenwood, Mississippi, or to walk, ride, or stand in organized groups on said sidewalks or streets while carrying banners, placards, signs or the like, or to sit, kneel, or recline on the sidewalks or streets of said City, or to engage in public speaking, group shouting, group singing or any other similar distracting activity on any of the sidewalks or streets of said City, or to assemble in groups on any sidewalk or street in such numbers or manner as to block or interfere with the customary and normal use thereof by the public unless the persons so assembled in such groups are engaged in watching a march or parade authorized by the provisions hereof; provided, however, that no written permission of the Chief of Police of said City shall be required for a bona fide funeral procession enroute to a cemetery or for any parade or march by any unit of the Mississippi National Guard or the United States Army, Navy, Air Corps, or Marine Corps, or by personnel of the Police or Fire Department of said City of Greenwood, Mississippi.

SEC. 76-C. UNLAWFUL TO THROW OR PLACE CERTAIN ARTICLES AND DEBRIS ON SIDEWALKS OR STREETS.

It shall be unlawful for any person or persons to throw or place nails, tacks, bottles, rocks, bricks, paper, trash or other debris of any kind on any sidewalk or street of the City of Greenwood, Mississippi.

SECTION 2. In order to preserve the public safety, peace, convenience and order, it is necessary that this ordinance be effective immediately, and therefore by unanimous vote of all members of the City Council of Greenwood, Mississippi, it is ordered that this amendment to an ordinance shall take effect and be in force from and after the date of its passage.